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RE BENNY ONG SWEE SIANG; EX P UNITED OVERSEAS BANK (MALAYSIA) BHD

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG JC
[BANKRUPTCY SUIT NO: 29-435-1998]
20 DECEMBER 2015

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BANKRUPTCY: *Discharge – Discharge of bankrupt – Appeal against – Whether Director General of Insolvency ('DGI') had absolute discretion to issue certificate of discharge – Whether DGI utilised all reasonable endeavours to locate bankrupt – Whether bankrupt's estate had been administered – Whether certificate of discharge ought to be issued – Bankruptcy Act 1967, ss. 33A and 33B*

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The judgment debtor ('JD') was adjudged a bankrupt by the High Court, following a creditor's petition filed by the judgment creditor ('JC'). The Director General of Insolvency ('DGI') then, *inter alia*, wrote to the JD at his last known address. The JD did not respond to the DGI and his estate was left unadministered. Subsequently, the DGI wrote to various organisations including the JC's solicitors, Companies Commission of Malaysia and the Majlis Perbandaran Pulau Pinang for further information and details relating to the JD. Thereafter, the DGI issued a notice of intention to issue a certificate of discharge in respect of the JD *vide* form 51B. The JC, on the contrary, served its notice of objection *vide* form 51C. The DGI rejected the JC's notice of objection on the grounds that (i) the case had been administered for 16 years; (ii) the JD could not be located despite actions taken by the Insolvency Department; (iii) the JD had no known assets to be distributed to the creditors; and (iv) no dividends could be declared to the creditors. In the circumstances, the JC filed its notice of application to the Senior Assistant Registrar ('SAR') to prohibit the DGI from issuing a certificate of discharge to the JD under s. 33B(4) of the Bankruptcy Act 1967 ('the application'). The SAR dismissed the JC's application. Hence, the present appeal.

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Held (allowing appeal with costs):

(1) According to ss. 33A and 33B of the Bankruptcy Act 1967 ('the BA'), the DGI did not have the absolute discretion to issue the certificate of discharge. The DGI's exercise of the discretion is subjected to the provision in s. 33B. It must be made judiciously depending on the circumstances of each case. (para 19)

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(2) On the facts, JD was 61 years of age and had been a bankrupt for the past 17 years. The DGI had twice written to the JD at his last known address but there was no response whatsoever from him. This suggested that the bankrupt JD could not be located. However, from the information furnished by the JC, the JD was still gainfully employed as

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a lecturer in Penang. In other words, the JD was traceable and the DGI had not utilised all reasonable endeavours to locate the JD. (paras 20 & 21)

(3) This was a situation of an unadministered estate in bankruptcy. There had been no recovery of the judgment debt to date from the JD which ought to have been the dividends paid out from the realisation of the assets of the JD. If the certificate of discharge was issued, the JD gets off scot-free. It was also too late for the JC to seek other modes of enforcement of judgment pursuant to O. 45 to 52 of the Rules of Court 2012 by virtue of the Limitation Act 1953. In the premises, it was just and expedient that the appeal should be allowed. Accordingly, the DGI should forthwith procure the attendance of the JD and commence the administration of the estate in bankruptcy. (paras 22, 23 and 24)

Case(s) referred to:

Public Bank Bhd v. Kok Lee Wah [2005] 5 CLJ 212 HC ***(refd)***

Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 HC ***(refd)***

Re Endon Tamseran; Ex p Parkash Singh Wasawa Singh [2009] 8 CLJ 379 HC ***(dist)***

Re Siow Ah Moi; Ex p United Orient Leasing Company Bhd [2007] 8 CLJ 104 HC ***(refd)***

Savrimuthu Sinnapan v. Public Prosecutor [1987] 1 CLJ 368; [1987] CLJ (Rep) 322 SC ***(refd)***

Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 15, 16, 17, 33A, 33B(4), (5), 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

Rules of Court 2012, O. 45, 46, 47, 48, 49, 50, 51, 56

For the judgment creditor - Gan Aiching; M/s Lim Huck Aik & Co
For the insolvency department - Nurul Ain Mat Ariffin; FC

Reported by Sandra Gabriel

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an appeal brought by the judgment creditor ("JC") against the decision of the Senior Assistant Registrar dated 18 June 2015 in refusing the JC's application to prohibit the Director General of Insolvency ("DGI") from issuing a certificate of discharge to the bankrupt judgment debtor ("JD") under s. 33B(4) of the Bankruptcy Act 1967.

[2] This appeal is essentially a re-hearing of the application pursuant to O. 56 of the Rules of Court 2012: see also *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241.

[3] Thus the relevant cause papers are as follows:

(i) JC's summons in chambers dated 12 February 2015;

(ii) JC's affidavit in support affirmed by Yong Lap Soon dated 12 February 2015; and

(iii) DGI's affidavit in reply affirmed by Dayang Siti Aminah binti Awang Aris dated 21 May 2015.

[4] I heard the appeal on 11 December 2015 and allowed it with no order as to costs. Accordingly I provide hereinbelow the grounds of my decision.

Salient Facts

[5] The JD was adjudged a bankrupt on 6 October 1998 by the High Court following the creditor's petition filed by the JC.

[6] Thereafter the JC filed its proof of debt amounting to RM 231,509.30 on 30 July 1999.

[7] The DGI on 6 January 1999 wrote to the National Registration Department and the Immigration Department notifying them of the bankruptcy. Also, the DGI wrote to the JD at his last known address to attend a meeting within seven days and to bring along copies of his list of assets, list of creditors and latest photograph.

[8] The JD did not respond to the DGI and his estate was left unadministered.

[9] Subsequently the DGI on 3 May 2012 wrote to various organisations including the JC's solicitors, Companies Commission of Malaysia and the Majlis Perbandaran Pulau Pinang for further information and details relating to the JD. The DGI also on the same date wrote to the JD at the same aforesaid address to attend a meeting and to bring along the same afore-requested documents.

[10] The JC's solicitors claimed to have responded to the DGI but the DGI claimed not to have received the response.

[11] Consequently the DGI on 10 July 2012 issued a Form 51B notice of intention to issue a certificate of discharge in respect of the JD and the JC on 16 July 2012 served its Form 51C notice of objection.

[12] The DGI responded to the JC on 29 January 2015 rejecting the JC's notice of objection on the grounds that the case has been administered for 16 years, the JD could not be located despite actions taken by the Insolvency Department, the JD has no known assets to be distributed to the creditors and no dividends can be declared to the creditors.

[13] As the result, the JC filed the notice of application that was heard by the learned senior assistant registrar on 18 June 2015.

Contention of the Parties

[14] Before me, the JC in gist contended that the certificate of discharge ought not to be issued because the JD's estate in bankruptcy has not been administered to date. There has neither been a meeting between the JD and DGI nor creditor meeting convened. Hence, the bankrupt JD has been left to lead a normal life notwithstanding he has been adjudged a bankrupt.

[15] On the other hand, the DGI contended that the JD had been bankrupted for the past 17 years and quoted the case of *Re Endon Tamseran; Ex p Parkash Singh Wasawa Singh* [2009] 8 CLJ 379. In that case Ahmadi Asnawi JC (now JCA) said as follows:

> [14] In the exercise of its powers under s. 33A(1) of the Act, the KP JIM is under no obligation to give reasons for so doing. However, in this case the KP gave all his reasons for wanting to discharge the bankrupt of her bankruptcy. It is perfectly within his discretion to do so and he is equally entitled to exercise his discretion to issue the certificate of discharge on those grounds. She was about 65 years old at the time PSWS01 was issued by the KP JIM on 4 November 2003. By now she would have been 70 years old. In a nutshell, on the uncontroverted facts it would serve no purpose whatsoever to prolong the bankrupt's bankruptcy any further. In the words of His Lordship Abdul Aziz bin Mohamad J (as he then was) in *Re Ah Kang* [1994] 2 CLJ 738 at p. 740:
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> > Pada pendapat saya adalah bertentangan dengan kepentingan awam sekiranya seseorang itu terus kekal sebagai seorang bankrap sedangkan keadaan itu tidak memberi guna kepada sesiapa.
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> I am on all fours with the views expressed therein.

The DGI further relied on the cases of *Public Bank Bhd v. Kok Lee Wah* [2005] 5 CLJ 212; [2004] 4 MLJ 433 and *Re Siow Ah Moi; Ex p United Orient Leasing Company Bhd* [2007] 8 CLJ 104; [2007] 3 MLJ 713 that a bankrupt may be released even before satisfying all the debts.

[16] The DGI also relied on the Hansard in relation to the parliamentary debate during the proposed amendment of s. 33A of the Bankruptcy Act 1967 on 29 July 1998. The Honourable Deputy Minister said as follows:

> Tujuan memasukkan seksyen 33A ini ialah untuk memudahkan seseorang bankrap mendapat pelepasan bagi kes-kes yang layak dan memberi peluang sekali lagi kepada bankrap berkenaan melibatkan diri dalam perniagaan dan perusahaan. Di samping itu, tujuan memasukkan seksyen ini juga ialah untuk menghapuskan kes-kes yang tidak boleh diteruskan lagi…Tuan yang di-Pertua, kerajaan berpendapat bahawa telah tiba masanya beberapa peruntukan di bawah Akta Kebankrapan 1967 dipinda menyesuaikan dengan perubahan semasa dan bagi mengatasi masalah yang dihadapi oleh kerajaan dalam mentadbir kes-kes kebankrapan lama

A yang tidak aktif … kes-kes yang tidak aktif ini sepatutnya telah pun dilepaskan tetapi Akta Kebankrapan 1967 tiada mengandungi peruntukan untuk membolehkan pelepasan bagi kes-kes terutamanya di mana bankrap tidak boleh dikesan, ketiadaan nombor kad pengenalan si bankrap, si bankrap telah tua dan lain lain lagi … Kerajaan berharap dengan meminda peruntukan mengenai pelepasan bankrap, kes kes lama yang
B tidak aktif dapat ditutup dan seterusnya dapat mengurangkan kes-kes lama yang tertunggak. Beban kerja di Jabatan Pemegang Harta juga akan dapat diringankan dan sumber manusia dapat diagih serta digunakan sepenuhnya untuk mengendalikan kes-kes aktif yang lebih penting.

[17] The bankrupt JD was absent both during the application before the
C learned senior assistant registrar and in this appeal.

Findings Of The Court

[18] Sections 33A and 33B of the Bankruptcy Act 1967 read as follows:

33A. Discharge of bankrupt by Certificate of Director General of
D Insolvency

(1) The Director General of Insolvency may, in his discretion but subject to section 33B, issue a certificate discharging a bankrupt from bankruptcy.

(2) The Director General of Insolvency shall not issue a certificate
E discharging a bankrupt from bankruptcy under subsection (1) unless a period of five years has lapsed since the date the receiving order and the order by which he was adjudged bankrupt were made.

(3) Notice of every discharge under subsection (1) shall be given by the Director General of Insolvency to the Registrar and the Director
F General of Insolvency shall advertise the notice in a local newspaper as prescribed.

(4) The Director General of Insolvency shall, upon the application of any interested person, issue a copy of the certificate of discharge to the applicant upon payment of the prescribed fee.

G 33B. Objection of creditor to discharge of bankrupt under section 33A

(1) Before issuing a certificate of discharge under section 33A, the Director General of Insolvency shall serve on each creditor who has filed a proof of debt a notice of his intention to issue the certificate.

H (2) A creditor who has been served with a notice under subsection (1) and who wishes to object to the issuance of a certificate discharging the bankrupt shall, within twenty-one days from the date of service of the notice, furnish a notice of the objection stating the grounds of his objection.

I (3) A creditor who does not furnish a notice of his objection and the grounds of his objection in accordance with subsection (2) shall be deemed to have no objection to the discharge.

(4) A creditor who has furnished a notice of his objection and the grounds of his objection in accordance with subsection (2) may, within twenty-one days of being informed by the Director General of Insolvency that his objection has been rejected, make an application to the court for an order prohibiting the Director General of Insolvency from issuing a certificate of discharge.

(5) Every application under subsection (4) shall be served on the Director General of Insolvency and on the bankrupt and the court shall hear the Official Assignee and the bankrupt before making an order on the application.

(6) On an application made under subsection (4), the court may, if it thinks it just and expedient:

(a) dismiss the application;

(b) make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Director General of Insolvency.

[19] From my reading of ss. 33A and 33B of the Bankruptcy Act 1967, the DGI does not have the absolute discretion to issue the certificate of discharge. The DGI's exercise of the discretion is plainly subjected to the provisions in s. 33B. It must be made judiciously depending on the circumstances of each case. In the Supreme Court case of *Savrimuthu Sinnapan v. PP* [1987] 1 CLJ 368; [1987] CLJ (Rep) 322; [1987] 2 MLJ 173, Salleh Abas LP held that public interest, reason and justice demand that any statutory power must be exercised reasonably and with due consideration.

[20] I am aware that the JD who is now 61 years of age has been a bankrupt for the past 17 years. The DGI has twice written to the JD at his last known address but there was no response whatsoever from him. This is suggestive that the bankrupt JD could not be located.

[21] However from the information furnished by the JC, it is clear that that the JD has been and is still gainfully employed as a lecturer in Olympia Business School in Penang. In other words, he is traceable. I am thus not satisfied that the DGI has utilised all reasonable endeavours to locate him including making internet searches in this modern day of information technology. From the evidence adduced, the DGI has merely written two letters to the JD, *to wit*: once in 1999 and again in 2012. No other attempts were made to procure his attendance at the Insolvency Department.

[22] In the circumstances, this is the situation of an unadministered estate in bankruptcy by reason that the procedures such as meeting of creditors, public examination of debtor and other administrative tasks as laid down in ss. 15 to 17 and 40 to 69 of the Bankruptcy Act 1967 have not yet been undertaken to date. This can easily be contrasted with the s. 33A case of *Re Endon Tamseran; Ex p Parkash Singh Wasawa Singh* (*supra*) relied by the

DGI where all the assets of the bankrupt who was then 65 years old had been realised and there was no longer any more contribution pursuant to the administration of the estate.

[23] That notwithstanding, I also took into consideration the plight of the JC in that there has been no recovery of the judgment debt to date from the JD which ought to have been the dividends paid out from the realisation of the assets of the JD. If the certificate of discharge is issued, the JD gets off scot-free. It is also too late in the day for the JC to seek other modes of enforcement of judgment pursuant to O. 45 to 52 of the Rules of Court 2012 by virtue of the Limitation Act 1953.

[24] In the premises, I find it is just and expedient that the appeal should be allowed. Accordingly the DGI should forthwith procure the attendance of the bankrupt JD and commence the administration of the estate in bankruptcy.

[25] In allowing the appeal, I am mindful that s. 33B(5) of the Bankruptcy Act 1967 has not been fully complied in that the bankrupt JD has not been served with the application and did not appear at the hearing or the appeal. In my view, the provision of service and appearance are only directory particularly in light of the special circumstances of this case. In *Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649, Edgar Joseph Jr J (later FCJ) said as follows:

> Accordingly, in my approach to the question whether the requirements of r. 3 are mandatory or directory I must ask myself the further question whether the requirements are vital and go to the root of the matter in which case they would be mandatory and therefore a breach thereof cannot be condoned for, as H.S. Ong FJ said in *Re Tan Boon Liat* [1977] 1 LNS 110[1977] 2 MLJ 108 at 116:
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> > there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions.
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> If the requirements of r. 3 are not mandatory, they would be directory only and a breach thereof could be condoned provided there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.
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> I derive support for the approach I propose adopting from the Indian Supreme Court decision in *Pratap Singh v. Sri Krishnan* AIR [1956] SC 140 where the appellant was a candidate for the office of President of a Municipal Committee. The nominations were made on forms which were old forms requiring the caste of the candidate to be stated, whereas the changed rule required the occupation of the candidate to be stated. All candidates filed their nominations in the old forms, but the respondent who knew the change in the law, struck out the word 'caste' put in 'occupation' and gave his occupation. The appellant having been elected, the respondent challenged the election and the High Court, on appeal, set aside the election. Allowing the appeal, the Supreme Court held:

> *We do not think that any failure to comply with any of the provisions set out in the various rules is fatal, and we deprecate his tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which Judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based common sense lines.*

Similarly, in the Privy Council case of *Punjab Co-operative Bank Ltd, Amritsar v. CIT Lahore* AIR [1940] PC 230, Viscount Maugham referred to the same principle in these terms:

> It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

So, also, in *Liverpool Borough Bank v. Turner* [1861] 30 LJ Ch 379, Lord Campbell said:

> No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with the implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. (emphasis added)

I also noted that the bankrupt was not made a party nor represented in *Re Endon Tamseran; Ex p Parkash Singh Wasawa Singh* (*supra*).

[26] Be that as it may, the attendance of the JD is in my view immaterial here because the administration of the estate in bankruptcy has never even commenced at all. This is unlike a partly or wholly administered estate wherein the representation of the bankrupt would be a vital factor to take into account whether to discharge the bankrupt.

Conclusion

[27] It is for the foregoing reasons that I have allowed the appeal as so ordered.